

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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U.S. DISTRICT COURT
DISTRICT OF MASS

IN RE: PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

MDL No. 1456

Master File No. 01-CV-12257-PBS

This Document Relates to
ALL CLASS ACTIONS

Judge Patti B. Saris

**NOTICE OF MOTION AND MOTION TO INTERVENE
IN THE *IN RE PHARMACEUTICAL INDUSTRY AVERAGE
WHOLESALE PRICE LITIGATION*, MDL No. 1456**

Proposed Intervenor Roberta S. Starks and Kimberly K. Hoover, as attorney-in-fact for her mother, Jeanne F. Kennedy, hereby move the Honorable Patti B. Saris, United States District Judge, in the John Joseph Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, for an order allowing them to intervene as representative plaintiffs in the *In re Pharmaceutical Industry Average Wholesale Price Litigation* pursuant to Federal Rules of Civil Procedure 24(a)(2) and (b)(2).

In support hereof, the Proposed Intervenor state as follows:

1. On June 12, 2003, an "Amended Master Consolidated Class Action Complaint" on behalf of a nationwide class was filed in the *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, Civil Action 01-CV012257-PBS (the "*In re AWP Litigation*"). A modified version of that complaint was filed December 5, 2003 entitled "Amended Master Consolidated Class Action Complaint Modified Per the Court's Instruction at the November 21, 2003 Hearing." (hereinafter "AMCC").

2. Among other allegations, the AMCC alleges that certain defendants (the "Together Card Defendants") engaged in an antitrust conspiracy in connection with the Together Rx Card

Program, a discount card program purportedly offering prescription drug discounts on over 170 widely prescribed drugs (“Together Card Drugs”) to uninsured, poor senior citizens. AMCC, Sec. VII.

3. The AMCC further alleges that the Together Card Defendants’ conspiracy caused Plaintiffs and the Nationwide End-Payor Together Card Class, and an alternatively pled Indirect Purchaser States End Payor Together Card Class, to pay more for the Together Card Drugs than they would have in the absence of the conspiracy. AMCC, ¶¶ 545, 724.

4. As alleged in the AMCC, the Nationwide End-Payor Together Card Class consists of:

All person[s] or entities in the United States and its territories who paid any portion of the purchase price for, or who reimbursed any portion of the purchase price of, a drug covered by the Together Rx Program on the basis, in whole or in part, on the published average wholesale price during the time period January 1, 2002 up to and including the present.

AMCC, ¶ 604. The Indirect Purchaser States End Payor Together Card Class consists of persons or entities in the indirect purchaser states who are otherwise identically situated to the nationwide class. *See* AMCC, ¶ 605.

5. The AMCC further alleges that the representative plaintiffs, all named plaintiffs excluding the association plaintiffs, *see* AMCC, ¶¶ 606, 607, include people and entities who “purchased the Together Card Drugs in, or outside of, the Together Card Program.” AMCC, ¶ 611 (emphasis added).

6. Attached as Exhibit A is the Proposed Intervenor’s AMCC which is identical in every way to the current working AMCC filed on December 5, 2003 but for the addition of Proposed Intervenor Roberta S. Starks and Kimberly K. Hoover, as attorney in fact for her mother, Jeanne F. Kennedy, as plaintiffs in the class action. *See* Ex. A, ¶¶ 36(a) and 36(b).

7. Proposed Intervenor Starks and Hoover, as attorney-in-fact for her mother, Jeanne F. Kennedy, are enrollees in the Together Rx Card Program and purchased Together Card Drugs as members of that program. *See* Ex. A, ¶¶ 36(a) and 36(b).

8. Proposed Intervenor's claims contain identical questions of law and fact to the claims alleged by Plaintiffs in the *In re AWP Litigation* as they relate to the Together Rx Card conspiracy. *See* Fed. R. Civ. P. 24(b)(2) ("Upon timely intervention anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common.").

9. Proposed Intervenor also have a direct and substantial interest in the subject matter of the *In re AWP Litigation* as the Together Card Defendants' conspiracy caused Proposed Intervenor to pay more for Together Card Drugs than they would have in the absence of the conspiracy. *See* Fed. R. Civ. P. 24(a)(2) ("Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."); *see also Caterino v. Barry*, 922 F.2d 37, 40 (1st Cir. 1990) (discussing requirements for intervention under Rule 24(a)(2)).

10. Proposed Intervenor are so situated that disposition of the *In re AWP Litigation* may impair or impede their ability to protect their interests. The AMCC involves the interests of Together Card enrollees and includes them in the class definition. As Together Card enrollees, the ability of the Proposed Intervenor to protect their interests will be at issue.

11. The Proposed Intervenor's motion to intervene is timely as: (a) both Starks and Hoover only recently learned of the allegations involving the Together Card conspiracy and moved to intervene without undue delay once aware of the conspiracy allegations; (b) the existing parties will

not suffer any undue prejudice by intervention at this point in the litigation as discovery is ongoing and will not be significantly affected by intervention, particularly where the inclusion of Together Card enrollees was already contemplated by the current AMCC allegations, *see* AMCC, ¶611; (c) the Proposed Intervenors would suffer prejudice if not allowed to intervene as a party and thereby participate in this litigation which affects them without having appeared in that litigation; and (d) no unusual circumstances militate against intervention, but on the contrary, militate for inclusion of Together Card enrollees as class representatives. *See Culbreath v. Dukakis*, 630 F.2d 15, 17, 20-24 (1st Cir.1980) (discussing factors implicating timeliness of an application to intervene).

For the foregoing reasons, Plaintiffs respectfully request that the Court issue an order allowing Plaintiffs Starks and Hoover to intervene in the *In re AWP Litigation* pursuant to Fed. R. Civ. P. 24(a)(2), as of right, or 24(b)(2), by permission of this Court.

Date: January 22, 2004

By Steve W. Berman/Signature on File

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CERTIFICATE OF SERVICE

I hereby certify that I, Edward Notargiacomo, an attorney, caused true and correct copies of the foregoing Notice of Motion and Motion to Intervene in the In Re Pharmaceutical Industry Average Wholesale Price Litigation, MDL No. 1456 to be served on all counsel of record electronically, pursuant to Section D of Case Management Order No. 2., this 22nd day of January, 2004.

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